

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED

JUL 25 2006

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY DEPUTY CLERK

ROARK & HARDEE L.P. d/b/a §
THE WAREHOUSE SALOON AND §
BILLIARDS, BILL HARDEE, 219 L.P. d/b/a §
219 WEST, PAUL SILVER, DEI GRATIA, §
INC. d/b/a THE ELYSIUM, JOHN §
WICKHAM, PUB DRAUGHT, INC. d/b/a §
LOVEJOYS TAP ROOM AND BREWERY, §
JOSEPH (CHIP) TAIT, BEERLAND, §
RANDALL STOCKTON, TENNIA B. §
BROWN d/b/a HORSESHOE LOUNGE, GMC §
INVESTMENT, INC. d/b/a EGO'S, CANARY §
ROOST, INC., CANARY HUT, INC., GAIL §
E. JOHNSON, SHEENA SEMMLER, §
JANET BUDMAN, KEEP AUSTIN FREE §
PAC, TONY SIRGO, and EDWARD CHECK, §
§
v. §
§
CITY OF AUSTIN §

CASE NO. A-05-CA-837 SS

CITY OF AUSTIN'S OBJECTIONS TO
PLAINTIFFS' AMENDED LIST OF EXHIBITS

TO THE HONORABLE SAM SPARKS, UNITED STATES DISTRICT JUDGE:

COMES NOW, Defendant City of Austin and files *City of Austin's Objections to Plaintiffs' Amended List of Exhibits* in response to *Plaintiffs' Amended List of Exhibits* pursuant to Rule CV 16 (e) (4), and offers as follows:

I.

Objections to Exhibits Designated by Plaintiffs

Plaintiff's List of Exhibits was due to be filed on Tuesday, July 18, 2006, but was not filed until July 21, 2006. Exhibit 1. For this reason, Defendant requests that Plaintiffs not be allowed to present their exhibits in trial.

Defendant specifically objects to the following witnesses designated by Plaintiffs:

Exh. 3 219 West Smoking Permit.

Defendant objects to this affidavit because 219 West is not a party. Furthermore, Keep Austin Free did not respond to discovery requests pertaining to 219 West.

Exh. 4 Relevant Portions of The Austin City Charter. Defendant objects because the documents are not fully identified. Furthermore, certain portions of the Charter lack relevance.

Exh. 5 Austin City Council Agenda for Thursday, March 3. Defendant objects because the document is not being fully identified. Furthermore, this document is irrelevant. Citizens of Austin (not City Council) were the legislators in regard to this ordinance.

Exh. 6 City of Austin Public Information Office New Release dated February 29, 2005, entitled "Anti-Smoking Petition Meets Signature Requirement for May 7 Ballot."
Defendant objects because of lack of relevance.

Exh. 7 Joe Ely "Letter to Laredo" Album Cover Demonstrating How Smoking is Part of Artistic Expression.

Defendant objects because of lack of relevance.

Exh. 8 Sample of Onward Austin Petition Papers.

Defendant objects because of lack of relevance.

Exh. 10 March 3 Council Meeting Log.

Defendant objects because of lack of relevance. Defendant further objects because this document contains hearsay.

Exh. 11 Official Ballot Language.

Defendant objects because of lack of relevance.

Exh. 12 Initiative as Approved for the Ballot by the City Council at March 3 Council Meeting.

Defendant objects because of lack of relevance. Citizens of Austin (not City Council) were the legislators in regard to this ordinance.

Exh. 13 Draft of Ordinance No. 050303-05 as Considered by City Council at March 3 Council Meeting.

Defendant objects because of lack of relevance.

Exh. 14 Austin Chronicle article, September 2, 2005, "911, We've Got a Smoker," Stevens, Darci (pg. 58).

Defendant objects because of lack of relevance. Furthermore, said document contains hearsay.

Exh's Defendant objects because Exhibits 15-22 were not timely disclosed nor
15-22 timely supplemented pursuant to the rules, the parties Rule 11 Agreements and/or
the Scheduling Order.

Exh's Re Rackdaddy's and Mickey's Thirsty I Lounge:

23-30 Defendant objects because these notices of violation were the subject of criminal proceedings in municipal court and the criminal defendants entered no contest pleas upon which a final judgment was obtained. Marc Levin represented Defendants Riva Smith and Michael Leathers on all charges. Smith and Leathers could have raised, as-applied, void-for-vagueness challenges and other legal arguments in the criminal proceeding. These issues are moot and any attempt to introduce evidence relevant to those criminal charges is a collateral attack on that judgment.

Exh's Re Click's Billiards:

31-33 Defendant objects as irrelevant. Click's is not a party. Keep Austin Free did
and not respond to discovery pertaining to Click's.

41-42

Exh's Re The Warehouse Saloon and Billiards:

34-40 Defendant may object to Plaintiff's offering these exhibits if they were not timely
disclosed or timely supplemented pursuant to the rules, the parties Rule 11
Agreements and/or the Scheduling Order.

Exh. 43 Notice to Appear William Ernest Hardee dated April 11, 2006.

Defendant objects because this exhibit was not timely disclosed; nor was
Hardee's deposition timely supplemented. Furthermore, this exhibit is irrelevant;
plaintiff can raise his arguments in the criminal proceeding.

Exh. 44 Spreadsheets compiled by Paul Silver detailing Texas Alcoholic Beverage
Commission sales tax receipts for establishments in the City of Austin with mixed
beverage license.

Defendant objects as hearsay and because Paul Silver is a lay witness and not an
expert. Prior to July 21st (after 5 p.m.), Silver was not listed as an expert. He
admitted in his deposition testimony that he has no special knowledge or expertise
in statistics, economics or other areas that would qualify him to testify about
economic effects of the smoking ordinance. Additionally, the evidence and
Silver's analysis are not reliable and his conclusions are subjective and
speculative.

Exh. 45 Man arrested in connection with smoking ban. KVUE News, available at
<http://kvue.com/news/local/stories/091205kvuesmokingscuffle-cb.4f0ee3a8.html>

Defendant objects as irrelevant.

II.

Prayer

WHEREFORE, the City of Austin prays that Defendant City of Austin's *Objections to Plaintiffs' Amended List of Exhibits* be granted and that all such exhibits be disallowed from being presented at trial and that Defendant recover its costs and reasonable attorney's fees and any additional relief to which it is entitled under law or in equity.

RESPECTFULLY SUBMITTED,

DAVID ALLAN SMITH
CITY ATTORNEY

Laurie Eisele for 06506270
LYNN E. CARTER
Assistant City Attorney
State Bar No. 03925990
City of Austin Law Department
Post Office Box 1546
Austin, Texas 78767-1546
(512) 974-2310
(512) 974-6490 (facsimile)
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing on all parties, or their attorneys of record, in compliance with the Federal Rules of Civil Procedure, this 25th day of July, 2006.

(Via Facsimile (512) 469-7480)

Marc A. Levin
Potts & Reilly, L.L.P.
401 West 15th Street, Suite 850
Austin, Texas 78701

/s/ia Certified Return Requested U.S. Mail
No. 7111 0293 8590 0000 0709

Lynn E. Carter for 06506270
LYNN E. CARTER

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ORDER GRANTING
CITY OF AUSTIN'S OBJECTIONS TO
PLAINTIFFS' AMENDED LIST OF EXHIBITS

ON THIS DAY came to be heard for consideration the foregoing the *City of Austin's Objections to Plaintiffs' Amended List of Exhibits*. The Court, after having considered such motion, and other pleadings properly on file with the Court, finds said motion to be meritorious.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the following Plaintiffs' Exhibits are hereby excluded from being submitted as evidence in the trial of this matter.

	Exh. 3	219 West Smoking Permit
	Exh. 4	Relevant Portions of The Austin City Charter
	Exh. 5	Austin City Council Agenda for Thursday, March 3

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Exh's 15-22 Re: Canary Hut Pub and Canary Roost

Exh's 23-30 Re Rackdaddy's and Mickey's Thirsty I Lounge:

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News, available at

<http://kvue.com/news/local/stories/091205kvuesmokingscuffle-cb.4f0ee3a8.html>

SIGNED the _____ day of _____, 2006.

SAM SPARKS, FEDERAL DISTRICT JUDGE